

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1996
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	IB Docket No. 95-59
Preemption of Local Zoning Regulation)	DA 91-577
of Satellite Earth Stations)	45-DSS-MISC-93

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COMMENTS OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

The Consumer Electronics Manufacturers Association ("CEMA"), a sector of the Electronic Industries Association, hereby submits the following comments in response to the Further Notice of Proposed Rulemaking ("*Further Notice*") which the Commission issued in the above-captioned proceeding on March 11, 1996.¹ In the *Further Notice*, the Commission has inquired whether Section 207 of the Telecommunications Act of 1996 requires: (1) any modification of the Commission's recently adopted rule preempting local government restrictions on satellite antennas; and (2) an extension of the Commission's recently adopted rule to prohibit purely private restrictions on the use of Direct Broadcast Satellite ("DBS") receive-only antennas.² As set forth below, CEMA concurs in the Commission's assessment that its recently

¹ See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order/Further Notice of Proposed Rulemaking, FCC 96-78, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (released Mar. 11, 1996).

² Section 207 directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996) [hereinafter the "Telecommunications Act"].

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adopted rule is not in conflict with Section 207. If anything, Section 207 requires the Commission to strengthen and simplify its prohibition against restrictions on the use of DBS antennas.

I. INTRODUCTION

CEMA is the principal trade association of the consumer electronics industry. CEMA members design, manufacture, import, distribute and sell a wide array of consumer electronics equipment, including television receivers and other video equipment. Virtually all Americans who view video programming do so on products produced by CEMA member companies. One of the most successful consumer electronics products to be introduced by CEMA's members in the recent past is the 18-inch parabolic antenna which is used to receive DBS video programming.³ CEMA members therefore have a direct interest in the outcome of this rulemaking proceeding.

II. DISCUSSION

In the *Further Notice*, the Commission has tentatively concluded that: (1) Section 207 does not require modification of its recently adopted preemption rule insofar as that rule affects services other than DBS; (2) its new rule reasonably implements Section 207 with respect to local government restrictions on DBS antennas; and (3) Section 207 requires a *per se* prohibition against any private restriction which "impairs a viewer's ability to receive video

³ See Comments of Satellite Broadcasting and Communications Ass'n of America, IB Docket No. 95-59, at 7-8 (July 14, 1995).

programming services over a satellite antenna less than one meter in diameter."⁴ CEMA agrees with the first of the Commission's conclusions, as well as with the thrust of the third. CEMA, however, is less sanguine about the second of the Commission's conclusions. CEMA believes the Commission should modify its rules so that, consistent with the intent of Section 207, the public can fully enjoy the benefits of DBS services.

A. Section 207 Does Not Require Any Changes in the Commission's Rules as They Apply to Services Other Than DBS

The *Further Notice* appropriately notes that, in passing Section 207, Congress could have prevented the Commission from preempting local restrictions on antennas used for services other than DBS. Significantly, Congress chose not to do so. Although the legislative history of Section 207 is brief, it clearly indicates that Congress was cognizant of the distinctions between DBS and other satellite services. The House Report, for example, notes "that the 'Direct Broadcast Satellite Service' is a specific service that is limited to higher power DBS satellites."⁵ The same report also indicates that the legislation is not intended to affect local government or private restrictions "that limit the use and placement of C-band satellite dishes."⁶ CEMA concurs in the Commission's analysis that, by focusing on DBS antennas, Congress did not intend to affect the Commission's preemption rules as they relate to other satellite services.⁷

⁴ See *Further Notice* at ¶¶ 59-62.

⁵ H.R. Rep. No. 204, 104th Cong., 1st Sess. 124 (1995).

⁶ *Id.*

⁷ See *Further Notice* at ¶ 61. Congress apparently failed to recognize that medium-power direct-to-home service is virtually identical to DBS service in that it utilizes small, unobtrusive receive-only antennas in the Ku-band to provide programming to consumers.
(continued...)

Indeed, had Congress intended to do so, it could have easily accomplished that result, as it did with respect to the Commission's video-dialtone rules.⁸

That Section 207 was not intended to limit the Commission's preemption of local restrictions on non-DBS satellite antennas finds further support in the fundamental purpose of the Telecommunications Act: namely to "promote competition and reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies."⁹ In this vein, Title II of the Act liberalizes broadcast licensing rules, grants the Commission exclusive jurisdiction over the provision of direct-to-home satellite services, and instructs the Commission to prohibit restrictions which impair the use of DBS antennas.¹⁰ Given the overall pro-consumer, pro-competitive thrust of the Telecommunications Act, Section 207 can *only* be read as an effort by Congress to ensure that the public's access to the competing wireless technologies enumerated by Section 207 is not frustrated by overreaching local and private restrictions. Section 207 certainly cannot be construed as limiting the Commission's ability to curtail similarly burdensome restrictions on satellite antennas used for other purposes.

⁷(...continued)

Given the pro-consumer and pro-competitive emphasis of Section 207, such antennas should be included in the definition of DBS for purposes of interpreting this section.

⁸ See Telecommunications Act, § 302(b)(3), 110 Stat. 124 (terminating the effectiveness of the Commission's rules adopted in CC Docket No. 87-266).

⁹ *Id.*, 110 Stat. 56.

¹⁰ See *id.*, 110 Stat. 107-08.

B. Section 207 Requires the Commission to Strengthen and Simplify the Prohibition Against Restrictions on the Installation and Use of DBS Antennas

Under the Commission's recently adopted preemption rule, DBS antennas under one meter in diameter are treated like any other satellite antenna of similar size. Local regulations concerning such antennas are presumptively preempted, but that presumption is subject to rebuttal for narrowly tailored health and safety reasons. Local authorities can also seek a waiver of the preemption rule to accommodate "highly specialized or unusual" circumstances.¹¹

Section 207 and its legislative history -- by singling out DBS from among other satellite services -- make clear that Congress intended DBS antennas to be afforded greater protection than other satellite antennas, so that the public can enjoy the tremendous benefits which this new technology brings. The context of the Telecommunications Act as a whole, as well as the express language of Section 207 itself, exhibit a clear congressional intent that local and private restrictions not handicap consumers in exercising their choice among DBS, multichannel multipoint distribution service ("MMDS") and broadcast over-the-air reception equipment.

Although the Commission's recently adopted rule is a step in the right direction in fulfilling this congressional mandate, it does not go far enough to ensure that consumers have the same access to DBS service as they do to other over-the-air video services. As the record of this proceeding demonstrates, local restrictions traditionally have discriminated against DBS

¹¹ *Further Notice* at Appendix II.

and other satellite antennas.¹² To ensure that the pro-consumer and pro-competitive goals of Section 207 are achieved, the Commission's preemption rule should be modified with respect to DBS antennas so as to:

- *Make irrebuttable the presumption that local government restrictions are preempted, but allow waivers in appropriate circumstances.* Under the current rule, local governments can rebut the Commission's presumption of preemption for narrowly tailored health and safety reasons, and either the Commission or a court of competent jurisdiction can determine whether the presumption has been successfully rebutted.¹³ Section 207, however, makes clear that Congress saw local restrictions on DBS antennas as a national concern requiring a uniform, national response. Such a response would not be possible if, through the rebuttal process, FCC decisions and the decisions of different courts created a patchwork quilt of rules concerning DBS antennas. Moreover, a rebuttable presumption would encourage forum shopping and efforts to recast impermissible restrictions based on aesthetic concerns as restrictions based on health or safety considerations. To prevent such a result and foster uniform, national rules, the Commission itself should review all future efforts of local governments to restrict the use of DBS antennas. The Commission should conduct this review in the context of the waiver process. Proponents of local restrictions should be required to demonstrate (1) why the restriction is essential *and* (2) how the restriction in

¹² See *id.* at ¶ 23.

¹³ See *id.* at Appendix II.

question accommodates Congress' interest in ensuring that the public has ready access to DBS technology.¹⁴

- *Clarify that any private entity seeking to enforce a private restriction bears the burden of proving to the Commission that such restrictions do not violate Section 207.* The proposed *per se* rule against private restrictions on DBS antennas would prohibit those restrictions which "impair" reception. Although this language tracks the statute, it is a significant source of ambiguity since reasonable people undoubtedly will differ on what constitutes impairment. To ensure that consumers have real choices among over-the-air video delivery systems, purchasers of DBS antennas must be protected from unsubstantiated, third-party claims that a particular private restriction is consistent with Section 207.
- *Ensure that the final DBS rule covers all DBS antennas, including those greater than one meter in diameter.* Although the 18-inch DBS antenna is the minimum size required, the *Further Notice* properly recognizes that DBS service outside the continental United States may require the use of antennas greater than one meter in diameter.¹⁵ Even so, these antennas are not expected to be significantly larger than one meter in diameter, because digital signal performance does not improve with antenna size and because of the increased cost and aesthetic

¹⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (waivers are appropriate where they do not undermine the policy underlying the rule). In contrast, the rebuttal process would only require the proponent of a restriction to demonstrate that it is narrowly tailored.

¹⁵ See *Further Notice* at ¶ 60.

penalties associated with larger antennas. The DBS service, and its related equipment, are being developed for the mass market. To achieve this, antennas must be easy to install and of a convenient, small size. The success of the DBS industry to-date, in fact, indicates the importance to the consumer of using as small an antenna as possible. Given this direction, CEMA sees no reason for discriminating among DBS antennas based solely on their size. Again, however, to address any legitimate local concerns, local governments could avail themselves of the waiver process.

Each of these recommendations is necessary to fully effectuate Section 207 of the Telecommunications Act.

In revising its rules, the Commission also should ensure that the regulations governing DBS antennas are consistent with those governing over-the-air broadcast and MMDS systems. To this end, the Commission's action in this proceeding should parallel or, better yet, be taken in tandem with its action in the proceeding addressing broadcast television and MMDS antennas, CS Docket No. 96-83.¹⁶ Such a course would ensure that, as the Commission's policies evolve, no unwarranted distinctions develop with respect to the devices identified by Congress for special protection.

¹⁶ See *Implementation of Section 207 of the Telecommunications Act of 1996/Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, Notice of Proposed Rulemaking, FCC 96-151, CS Docket No. 96-83 (released Apr. 4, 1996).

III. CONCLUSION

The Commission should therefore revise its rules governing restrictions on DBS antennas as set forth herein. Only by doing so will the Commission succeed in effectuating the pro-consumer and pro-competitive purposes of Section 207 of the Telecommunications Act of 1996.

Respectfully submitted,

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